

**U.S. Department of Labor**

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**Issue Date: 03 July 2003**

**CASE NO.: 2003-LHC-143**

**OWCP NO.: 06-177676**

**IN THE MATTER OF**

**EDDIE H. DAVIS,  
Claimant**

**v.**

**BENDER SHIPBUILDING & REPAIR,  
Employer**

**APPEARANCES:**

**MICHAEL G. HUEY, ESQ.  
On behalf of the Claimant**

**DOUGLAS L. BROWN, ESQ.  
On behalf of the Employer**

**Before: LARRY W. PRICE  
Administrative Law Judge**

**DECISION AND ORDER DENYING BENEFITS**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Eddie H. Davis (Claimant) against Bender Shipbuilding & Repair (Employer/Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was

held in Mobile, Alabama, on May 8, 2003. All parties were afforded a full opportunity to adduce testimony and offer documentary evidence. The following exhibits were received into evidence:

1. Joint Exhibit 1;
2. Claimant's Exhibits 1-5; and
3. Employer's Exhibits 1-11

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

## **I. STIPULATIONS**

During the course of the hearing the parties stipulated and I find as related to Case No. 2003-LHC-00143 (JX-1):

1. Jurisdiction is not a contested issue. Employer is in the business of new ship construction as well as ship repair. Claimant was working on a dry dock located on the navigable waters of the Port of Mobile. Therefore, Claimant has situs and status.
2. Date of injury/accident: April 1, 1998.
3. Injury in course and scope of employment: Yes.
4. Employer/employee relationship at time of accident: Yes.
5. Date Employer advised of injury: April 1, 1998.
6. Date Notice of Controversion filed: September 11, 2001.
7. Date of informal conference: January 10, 2001.
8. Average weekly wage at time of injury: \$312.03.
9. Nature and extent of disability
  - (a) Benefits paid:

TTD paid during the following periods: April 1, 1998 through April 22, 1998; May 19, 1998 through May 24, 1998; June 18, 1998; July 9, 1998 through July 13, 1998; July 22, 1998 through

November 9, 1998; January 19, 1999 through September 24, 1999; February 28, 2000 through July 2, 2000; October 31, 2000 through November 19, 2000; December 19, 2000 through February 1, 2001; March 23, 2001 through August 27, 2001.  
Total: \$21,307.51.

(b) Medical benefits paid? Yes.

10. Permanent disability: Yes. Percentage: 20% permanent partial impairment rating.
11. Date of maximum medical improvement: April 27, 2001.

## **II. ISSUES**

The unresolved issues in this proceeding are:

1. Nature and extent of disability after July 31, 2001.
2. Attorney's fees, interest and penalties.

## **III. STATEMENT OF THE CASE**

### **Claimant's Testimony**

Claimant, who resides in Mobile, Alabama, dropped out of school in the eleventh grade and does not have a high school diploma or a GED. (Tr. 9-11). He has had some on-the-job training for various jobs, including driving a forklift, painting and maintenance. (Tr. 11). Although Claimant has held various jobs as a laborer, primarily in shipyards, he has never worked as a cashier, exterminator, motel desk clerk, sales person, automotive technician or a crane operator. His only experience as a security guard was with Employer. (Tr. 13-14).

In April 1998, Claimant was working the night shift under the dry dock. As he pulled his pressure washer up under the boat, he backed into a keel block, injuring his back. (Tr. 14). After Claimant reported his injury, he saw Dr. Andre Fontana, who X-rayed Claimant's back and diagnosed him with a disc problem. (Tr. 15). Dr. Fontana took Claimant off work at that time, but Claimant soon returned to light duty and worked as a security guard, checking in cars at the gate. (Tr. 15-16). Claimant worked as a security guard until his first surgery, a percutaneous discectomy performed by Dr. John Semon in 1999. (Tr. 16-17).

After this surgery, Claimant returned to work as a security guard until he underwent an upper laminectomy in March 2000. (Tr. 17, 24).

When Claimant returned to work, he was assigned to the warehouse, where he fixed extension cords for three to four months before moving to tool repair, where he was trained to repair torches, blowers and welding whips, among other tools. (Tr. 18). This job required Claimant to stand and load a dolly with torches, grinders and other machines and bring it back to his work station, about fifty steps in distance. (Tr. 19). Claimant estimated that the loaded dolly weighed about fifty pounds. He reported that this job caused him back pain which sometimes extended into his leg. (Tr. 20). In an eight hour day, Claimant had to lift objects weighing two to five pounds approximately four to five times per hour. (Tr. 21). Although Claimant did not weigh any of the tools that he worked with, he testified that a buckeye sander weighed about eight to ten pounds, a blower fan weighed about fifteen pounds and a grinder weighed about ten to twelve pounds. (Tr. 22). As part of the repair process, Claimant had to change out the motors on these tools. The motors were located in a storage area about ten feet from Claimant's work station. (Tr. 23). Claimant worked at a table and was allowed to take breaks as needed. (Tr. 23-24).

Claimant continued at the tool repair job until sometime in 2001, when he pulled his back one day while working. (Tr. 25-26). At that time, Dr. Semon took Claimant off work. Claimant testified that Dr. Semon has never told him that he is able to return to work. (Tr. 26). According to Claimant, Dr. Semon did not want him to do any more shipyard work and told him to medically retire. (Tr. 102). Claimant affirmed that Dr. Semon's advice, coupled with his own back problems, led him to leave the tool repair job. (Tr. 102-103). Since that time, Claimant has experienced good days and bad days with regard to his back pain. (Tr. 27). He has received epidural shots and sometimes uses a cane and/or a neck brace. (Tr. 26-27). Claimant attempted to do yard work on occasion but reported to Dr. Semon that he was unable to do it. (Tr. 28).

On May 31, 2001, Employer sent Claimant to Dr. William Crothwell for an independent medical examination (IME). (Tr. 28-29). Dr. Crothwell examined Claimant for about fifteen minutes and told him that he was able to return to work. In addition, Claimant underwent a functional capacity evaluation (FCE) ordered by Dr. Crothwell. The FCE took about two hours. (Tr. 29). During the FCE, Claimant had to run up steps, walk around, crawl, bend over, squat and carry things. (Tr. 30). As per Dr. Crothwell's orders, Claimant did return to work for about three to four weeks after the FCE. However, when Claimant saw Dr. Semon again, Dr. Semon told him not to return to work. Claimant last worked in July 2001. (Tr. 31).

At Employer's behest, Claimant met with a vocational rehabilitation counselor for an hour and a half on one occasion. (Tr. 33). Claimant took spelling, reading and math tests

but was not told his scores on those tests. (Tr. 34). Claimant agreed that he is able to read and write. (Tr. 68). Claimant affirmed that he told the counselor, Eric Anderson, that he did not have a high school diploma or a GED. (Tr. 36).

Claimant testified that he applied for many job opportunities that were listed by Mr. Anderson, but he was told numerous times that he was not qualified for these jobs because he did not have a high school diploma, a GED and/or some prior experience. (Tr. 36-51, 55-62). In addition, Claimant was not qualified for certain other jobs, such as pizza delivery, because his driver's license has been suspended since he went to jail for failure to pay child support and for loitering. (Tr. 41-43). Claimant affirmed that in order to get his license back, he would need to take a test and pay a fee. (Tr. 100). He agreed that with a license, he would feel comfortable commuting to other cities for jobs. (Tr. 101).

Although Claimant was qualified for a job as a sweeper driver, the company had already filled the position by the time he applied. (Tr. 44). He also applied for jobs as a dispatcher and as a lube technician, but these jobs were also filled when he applied. (Tr. 52, 54). Claimant called about a job as a forklift operator, but the company was not hiring at that time. (Tr. 55-56). Claimant attempted to obtain a job as a counter helper at a dry cleaners, but that job was filled as well. (Tr. 59). Claimant affirmed that he felt capable of doing the sweeper driver job and the forklift job. (Tr. 101-102). Claimant explained that whenever he followed up on the list of job opportunities, he requested that the potential employers sign a piece of paper to show that he had been there. However, many potential employers refused to sign anything because they did not want to get involved in a workers' compensation case. (Tr. 61).

Claimant affirmed that once he left work on July 31, 2001, he did not seek employment until about six months before the hearing in this case. (Tr. 69-70). Claimant testified that he might be able to do the tool repair job at Employer's facility, but his main problem with the job was that he had to walk sometimes and he also pulled his back while working there. (Tr. 64-65). Claimant last saw Dr. Semon in February 2003, and Dr. Semon did not change his restrictions or tell him to return to work at that time. (Tr. 65-66). Claimant told Dr. Semon that he was going on job searches, and Dr. Semon told him to go ahead and try it if he was able. (Tr. 66). They have discussed the possibility of another back surgery sometime in the future. (Tr. 67-68).

Claimant agreed that Employer has paid all his medical bills as well as all compensation benefits due. (Tr. 70-72). In addition, Employer paid Claimant at his pre-injury wage rate when he worked as a security guard and when he worked in tool repair. (Tr. 71, 73). Claimant agreed that his tool repair job mostly consisted of working on welding torches, which weigh about three to five pounds. (Tr. 74). He affirmed that he could easily hold a torch in his hand, even if he had back pain. (Tr. 75). Claimant was able to sit and

stand as needed and could also move around on the job. (Tr. 76). In addition, Claimant could ask for assistance if he was unable to lift something by himself. (Tr. 77). Further, Claimant's supervisors never asked him to do anything that he felt unable to do. (Tr. 78).

Claimant affirmed that he has not been bedridden since he pulled his back in July 2001. He agreed that he could probably have returned to doing the tool repair job within a day or two after the incident occurred. (Tr. 81). Claimant testified that he never said he was unable to do the tool repair job, and the reason he never returned to work was because Dr. Semon told him not to do so. (Tr. 103). Claimant did not know that the reason Dr. Semon told him not to return to work was because Dr. Semon thought Claimant would have to lift thirty to fifty pound objects on a regular basis. Claimant was unaware that Dr. Semon later clarified his opinion and stated that the tool repair job would be appropriate for Claimant. (Tr. 104). He affirmed that although he received a letter from Employer stating that there was a job available within his restrictions, he did not return. (Tr. 105). Claimant was also told that he could return to his security job, but he told Employer that his doctor advised him not to return to work. (Tr. 107-108). Claimant acknowledged that in the security job, he would not have to lift and he would be able to walk, sit and stand. (Tr. 108).

Claimant affirmed that he testified in deposition that he uses his cane every day and never walks without it. (Tr. 82). He agreed that he danced on a Caribbean cruise in April 2002 but testified that he had his brace on at the time. (Tr. 85, 87). Claimant acknowledged that when out on the water or walking on rocks at the beach, he did not use a cane or a brace. (Tr. 87-88). He affirmed that he can bend at the waist with the assistance of his brace and that he was not required to bend at the waist while working in tool repair for Employer. (Tr. 89-90). When Claimant went on the cruise, his suitcase weighed about twice as much as the tools that he handled each day at work. (Tr. 96).

### **Testimony of William D. Blount, Jr.**

Mr. Blount has worked for Employer as a shipfitter/welder for three years. (Tr. 109). In addition, he has also worked in light duty tool repair in the surplus warehouse after he ruptured a disc in his back in August 2001. (Tr. 110-11). In the tool repair job, employees check valves on torches and check the mixer valve and hook lines up to it, among other duties. (Tr. 110). Mr. Blount testified that this job does not involve any heavy lifting. (Tr. 111). He affirmed that the written job description for tool repair accurately describes the job. When Mr. Blount worked in tool repair, the supervisors never made him lift more than he was able to lift. (Tr. 113). In addition, the supervisors also encouraged Mr. Blount to sit down more on the job. (Tr. 114). According to Mr. Blount, the tool repair job gave him the flexibility to move around as needed. (Tr. 114-15). Mr. Blount was not sure how many times an hour, on average, that he picked up a torch, because it depended on the torch's

condition. He testified that he might have picked up a torch five or six times an hour on occasion. (Tr. 115-16).

### **Testimony of Lee Ann Dorsey**

Ms. Dorsey is a licensed professional counselor. (Tr. 116). In Claimant's case, she visited his work site and reviewed the tool repair job description and his medical records in order to determine suitable alternative employment opportunities for Claimant. (Tr. 120-21). Ms. Dorsey testified that the tool repair job was within Claimant's restrictions and she would not have hesitated to recommend this job to Claimant. (Tr. 121). In addition, she concluded that Claimant is able to do other types of jobs, including cashier work and some security guard work. (Tr. 122).

Ms. Dorsey affirmed that she wrote many letters and reports to Claimant's attorney, detailing various job opportunities, and she also read the letters written by Mr. Anderson, her colleague. She agreed that all the jobs identified by Mr. Anderson were suitable for Claimant. (Tr. 123). In addition, she felt that all the jobs she identified were also appropriate for Claimant. All the jobs identified by Mr. Anderson and Ms. Dorsey were readily available at the time that they wrote their respective letters. (Tr. 124).

Ms. Dorsey only met with Claimant briefly on one occasion, and she never personally evaluated him. (Tr. 126). Although Ms. Dorsey did not do any vocational testing on Claimant, she was aware of Dr. John Davis' psychological evaluation, in which he determined that Claimant has a full-scale IQ of 70, which might or might not be underrepresentative of Claimant's actual capabilities. Ms. Dorsey affirmed that a 70 IQ is commonly known as borderline retardation, but she did not know whether someone with a 70 IQ would automatically qualify for social security disability. (Tr. 125). Ms. Dorsey also knew that Claimant's WRAT results indicated a fourth grade reading level, a second grade spelling level and a fifth grade arithmetic level. Nonetheless, Ms. Dorsey did not feel that these test scores indicated that Claimant would have difficulty finding employment. (Tr. 131).

### **Deposition of John E. Semon, M.D.**

Dr. Semon is an orthopedic surgeon who first saw Claimant on January 15, 1999. (CX. 1, pp. 6-7). At that time, Claimant reported that he had injured his back about nine months prior to that time, on April 1, 1998. Claimant told Dr. Semon that he had backed into a keel block at work and immediately began to experience lower back pain, which later radiated down his right leg to his ankle and foot. Since that time, Claimant had experienced intermittent back pain which eventually began to worsen. (CX. 1, p. 8). He had been treated

with rest, medication, physical therapy and epidural blocks, none of which offered any lasting relief.

Upon physical examination, Claimant had tenderness in his back but there was no muscle spasm. (CX. 1, p. 9). Claimant had full range of motion of the lumbar spine with mild pain at the extremes of motion, and a straight leg raising test was questionably positive at eighty degrees. Claimant had decreased sensation in his left big toe in the L5 nerve root distribution, with very questionable weakness of the ankle jerk indicating a possible S1 lesion. Claimant had no motor weakness. His MRI scan showed a moderate bulge at the L4-L5 and L3-L4 discs but nothing at the L5-S1 level. (CX. 1, p. 10). At that time, Dr. Semon scheduled Claimant for discograms at those levels to determine the source of Claimant's back pain. He did not know whether he took Claimant off work at that time. (CX. 1, p. 11).

On February 23, 1999, Dr. Semon performed a percutaneous discectomy on the third and fourth lumbar discs. In this procedure, Dr. Semon essentially removed a portion of Claimant's herniated discs. (CX. 1, p. 12). According to Dr. Semon, Claimant failed to improve after the procedure. (CX. 1, p. 13). Several months later, Dr. Semon did another MRI scan which showed that Claimant had mild disc space narrowing at L4-L5 with a diffuse five millimeter disc bulge still present. (CX. 1, pp. 13-14). On July 27, 1999, Dr. Semon concluded that either Claimant would have to live with the pain or undergo an open laminectomy, so he referred Claimant to Dr. Petersen for a second opinion. Dr. Petersen agreed that Claimant should undergo an open laminectomy. (CX. 1, p. 14). In the meantime, Claimant was allowed to continue working for Employer on light duty.

When Dr. Semon saw Claimant again in October 1999, Claimant still had not decided whether he wanted to undergo the recommended surgery. He continued to work on light duty and complained of lower back pain and left leg pain, so Dr. Semon ordered another epidural block, which did not help. (CX. 1, p. 15). On November 30, 1999, Claimant had not improved and was still considering whether to have the laminectomy. (CX. 1, pp. 15-16). On January 24, 2000, there was no change in Claimant's status and he was still undecided on the surgery. He continued to work on light duty. On February 10, 2000, Claimant finally decided to undergo the open laminectomy, and Dr. Semon referred him back to Dr. Petersen. (CX. 1, p. 16). On February 25, Dr. Petersen examined Claimant's most recent MRI and noted a significant foraminal and far lateral disc herniation on the left at L3-L4 as well as a lateral herniation at L4-L5.

On March 31, 2000, Dr. Petersen performed a lumbar laminectomy at the L3-L4 and L4-L5 levels on the left side. On April 11, Claimant returned to see Dr. Petersen and reported that he continued to have lower back pain and left lower leg pain. (CX. 1, p. 17). On August 15, 2000, Dr. Petersen gave Claimant an epidural block, and Claimant reported about fifty percent relief from his pain. Dr. Petersen also performed a trigger point injection

at that time, and he planned to schedule Claimant for an FCE. (CX. 1, p. 18). On September 15, Dr. Petersen reviewed the FCE results, which indicated that Claimant was capable of light to medium duty work. Dr. Petersen agreed with this assessment. Claimant was restricted to lifting thirty pounds or less and was to avoid frequent bending, twisting, climbing and crawling. It was recommended that Claimant have five minute breaks from prolonged sitting and standing. Claimant continued to complain of lower back pain and left lower leg pain, so Dr. Petersen ordered some more discograms. (CX. 1, p. 19).

When Dr. Semon next saw Claimant on September 28, 2000, Claimant's complaints remained the same. He also reported numbness in his left foot. Discograms were performed, and Dr. Semon noted positive provocative pain tests at L3-L4 and L4-L5. (CX. 1, p. 20). On November 9, Dr. Semon suggested either a thermal heat procedure or a fusion at L3-L4 and L4-L5. (CX. 1, p. 21). When Dr. Petersen saw Claimant on November 15, he felt that Claimant's options were to continue conservative treatment and light duty work or, as a last resort, to undergo a fusion. (CX. 1, pp. 21-22). Dr. Semon saw Claimant again on December 20, 2000, and Claimant's condition remained unchanged. At that time, Dr. Semon suggested that Claimant try pain management for two to three months and then consider the two previously suggested procedures. Because Claimant reported a recent flare-up in back pain, Dr. Semon took him off work for two weeks. (CX. 1, p. 22).

When Claimant returned to Dr. Semon on February 9, 2001, he had undergone an epidural block with another doctor and was back at work on light duty but continued to have pain. Claimant reported that he was unsure how much longer he could work with chronic pain. Dr. Semon recommended that Claimant continue to work on light duty status. On March 23, 2001, Claimant returned to see Dr. Semon and reported that he had been pulling on some cables at work when they became tangled and jerked him back. (CX. 1, p. 23). In this incident, which occurred on March 13, 2001, Claimant felt a sudden onset of lower back pain radiating into his left leg. (CX. 1, pp. 23-24). Claimant went home and missed a day of work before returning, but he reported that his pain worsened over time. Claimant saw Dr. Tim Revels at the behest of the Employer's insurance company, and Dr. Revels recommended conservative treatment. Dr. Semon decided to take Claimant off work for a little while and then return him to light duty. At that time, Dr. Semon felt that Claimant was not doing very well with light duty. (CX. 1, p. 24).

On two occasions in April 2001, Dr. Semon saw Claimant and reported no improvements in his condition. Dr. Semon therefore concluded that Claimant was unable to work and was permanently totally disabled. (CX. 1, p. 25). Dr. Semon testified that from a practical standpoint, Claimant reached MMI on April 27, 2001. (CX. 1, p. 26). In Dr. Semon's opinion, Claimant has a residual permanent partial disability. He estimated that Claimant has about twenty percent permanent partial disability. Dr. Semon noted that Claimant is significantly limited in his physical abilities and cannot do prolonged sitting or

standing or frequent bending, stooping, twisting, crawling or climbing. (CX. 1, p. 27). Dr. Semon further pointed out that Claimant has a limited educational background, such that he probably is not qualified for many forms of light duty work.

Dr. Semon recommended that Claimant not lift more than twenty pounds and no more than three to five pounds on a regular basis. (CX. 1, p. 28). In his opinion, Claimant could not work in a shipyard unless he had an office job where he could work inside and sit and stand as needed. (CX. 1, pp. 28-29). Dr. Semon testified that he disagreed with the results of an FCE ordered by Dr. Crotwell in June 2001, which indicated that Claimant could do medium duty work, because Dr. Semon felt that Claimant was not capable of working at that level, particularly with regard to the medium duty lifting capacity. (CX. 1, pp. 30, 36). Dr. Semon acknowledged that his opinion was based upon his observation of Claimant and that he personally did not take any measurements of Claimant's lifting abilities. (CX. 1, p. 37).

Since Dr. Semon has continued to see Claimant, Claimant has persisted with the same complaints. (CX. 1, pp. 30-31). Dr. Semon last saw Claimant on March 21, 2003. His condition was unchanged, and Dr. Semon gave him a cortisone injection and prescribed pain medication, muscle relaxants and anti-inflammatory medication. He affirmed that this is the same basic course of treatment that Claimant has received since July 31, 2001. (CX. 1, p. 31). As of this last appointment, Dr. Semon diagnosed Claimant with degenerative disc disease with chronic low back pain syndrome. He affirmed that Claimant's complaints of pain were consistent with his diagnostic tests and clinical observations. In Dr. Semon's opinion, Claimant had tried to do light duty as long as possible, but the work was too much for him. (CX. 1, p. 32).

According to Dr. Semon, Claimant's condition will likely stay the same but may worsen over time. It is possible that Claimant may develop arthritis due to his back problems. Dr. Semon felt that "it would be fruitless" to keep Claimant in a light duty job at a shipyard. (CX. 1, p. 33). He agreed, however, that he would have approved the light duty job if Claimant had reported that he only had occasional aches and pains at work. (CX. 1, p. 37). When given a written description of the tool repair job at Employer's facility, Dr. Semon testified that the job requirements seemed to be within Claimant's abilities as long as Claimant did not have to lift over three to five pounds on a regular basis. (CX. 1, pp. 39-40).

### **Medical Records of Andre J. Fontana, M.D.**

On April 7, 1998, Dr. Fontana saw Claimant, who had recently suffered the workplace injury in question. At that time, Dr. Fontana took Claimant off work and recommended conservative care. (CX. 3, p. 9). On April 14, Claimant returned with the same complaints of lower back pain and left leg pain and numbness, so Dr. Fontana recommended an MRI

and EMG and nerve conduction studies. Claimant remained off work. On April 21, Dr. Fontana noted that Claimant's condition had greatly improved, and his back was only a little sore. Claimant's nerve studies showed evidence of active denervation in the L5-S1 area, and his MRI showed a bulging disc. Dr. Fontana determined that Claimant could return to light duty work but should avoid climbing and lifting over five pounds. On May 5, Claimant returned with complaints of left hip and leg pain but reported some improvement with regard to his back pain. Dr. Fontana kept Claimant on light duty with the same restrictions. (CX. 3, p. 8).

As Dr. Fontana continued to follow Claimant through 1998 and January 1999, Claimant's condition remained relatively unchanged, aside from occasional flare ups in pain. Dr. Fontana ordered epidural shots from time to time, but this treatment provided no lasting relief for Claimant. (CX. 3, pp. 1-7). Dr. Fontana last saw Claimant on April 6, 1999, about one month after Claimant had undergone a percutaneous discectomy. Claimant reported that he continued to have problems with his back and left leg. (CX. 3, p. 1).

#### **Medical Records of Tim S. Revels, M.D.**

Dr. Revels saw Claimant on a workers' compensation consultation on March 15, 2001. At that time, Dr. Revels reviewed Claimant's medical records and recounted the history of his workplace injury and subsequent surgeries. (EX. 2, p. 3). Claimant complained of lower back pain and left leg pain, and Dr. Revels noted that none of Claimant's medical treatment had significantly improved his condition. (EX. 2, pp. 3-4). Dr. Revels and Claimant discussed the possibility of a fusion procedure, and Dr. Revels told Claimant that a fusion would not guarantee 100% improvement but might decrease some of his pain. (EX. 2, p. 5). Dr. Revels recommended that Claimant continue conservative treatment and not undergo the fusion procedure. (EX. 2, p. 6).

On July 11, 2002, Dr. Revels reviewed Claimant's latest FCE and the tool repair job description. (EX. 2, p. 2). He determined that Claimant could perform the tool repair job. (EX. 2, p. 1).

#### **Medical Records of William A. Crotwell, M.D.**

On May 31, 2001, Dr. Crotwell performed an IME on Claimant. He recounted the history of Claimant's injury and subsequent treatment. At that time, Claimant had recently pulled his back at work and complained of lower back and left leg pain, as well as numbness and tingling in his foot. (EX. 3, p. 15). Upon physical examination, Dr. Crotwell concluded that Claimant could return to light duty work within the restrictions listed in his August 2000 FCE. Dr. Crotwell found multiple inconsistencies between Claimant's examination and his subjective complaints. He recommended another FCE to determine Claimant's capacities

and to see whether symptom magnification or other inconsistencies were present. Dr. Crotwell felt that Claimant had reached MMI with a ten percent whole person impairment. (EX. 3, p. 16).

On August 10, 2001, Dr. Crotwell noted that Claimant had undergone a second FCE on June 27, 2001. According to Dr. Crotwell, the FCE demonstrated that Claimant could lift in the medium work category, such that Claimant was capable of carrying out an even more strenuous work than was indicated in his August 2000 FCE. Dr. Crotwell thus concluded that his original recommendations were reasonable and Claimant could return to light duty work. (EX. 3, p. 13).

On July 9, 2002, Dr. Crotwell determined that the tool repair job was suitable for Claimant, provided that it fit within his August 2000 FCE restrictions. (EX. 3, p. 14). On March 20, 2003, Dr. Crotwell reviewed a series of job descriptions and determined that each position fit within Claimant's restrictions and constituted suitable employment. (EX. 3, pp. 1-12).

#### **Medical Records of John W. Davis, M.D.**

Dr. Davis, who is a clinical psychiatrist, performed a psychological evaluation on Claimant on June 12, 2001. (EX. 7, p. 1). At that time, he reviewed Claimant's personal, employment and medical history and administered several evaluative tests. (EX. 7, pp. 2-3). Dr. Davis diagnosed Claimant with mild depression secondary to physical condition but concluded that from a psychological standpoint, Claimant had no limitations or restrictions. (EX. 7, pp. 5-6). Dr. Davis further noted that Claimant would benefit from a return to work. (EX. 7, p. 6).

### **IV. DISCUSSION**

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the “true-doubt” rule, which resolves factual doubt in favor of the claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff’g 990 F.2d 730 (3d Cir. 1993).

## **Nature and Extent**

Having established work-related injuries, the burden rests with the Claimant to prove the nature and extent of his disability, if any, from those injuries. Trask v. Lockheed Shipbldg. Constr. Co., 17 BRBS 56, 59 (1985). A Claimant’s disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Trask, 17 BRBS at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette W. Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbldg. & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enter., Ltd., 14 BRBS 395 (1981).

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the Act means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121, 122 (1997). A claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss or a partial loss.

A claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991).

It is undisputed in this case that Claimant has been unable to return to his former, full duty employment as a shipyard laborer since his April 1998 workplace accident. Thus, Claimant has established a prima facie case for total disability.

### **Suitable Alternative Employment**

Once a claimant has established a prima facie case for total disability, the employer may avoid paying total disability benefits by showing that suitable alternative employment exists that the injured employee can perform. The claimant does not have the burden of showing there is no suitable alternative employment available. Rather it is the duty of the employer to prove that suitable alternative employment exists. Shell v. Teledyne Movable Offshore, 14 BRBS 585 (1981); Smith v. Terminal Stevedores, 111 BRBS 635 (1979). The employer must prove the availability of actual identifiable, not theoretical, employment opportunities within the claimant's local community. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980). The specific job opportunities must be of such a nature that the injured employee could reasonably perform them given his age, education, work experience and physical restrictions. Edwards v. Director, OWCP, 999 F.2d 1374 (9th Cir. 1993), cert. denied, 511 U.S. 1031 (1994); Turner, 661 F.2d at 1041-1042. The employer need not place the claimant in suitable alternative employment. Trans-State Dredging v. Benefits Review Bd. (Turner), 731 F.2d 199, 201, 16 BRBS 74, 75 (CRT) (4th Cir. 1984), rev'g 13 BRBS 53 (1980); Turner, 661 F.2d at 1043; 14 BRBS at 165. However, the employer may meet its burden by providing the suitable alternative employment. Hayes, 930 F.2d at 430.

A job within an employer's facility continues to meet the employer's burden of proof where it is suitable and available even if the claimant fails to report to work. Walters v. Ingalls Shipbldg., Inc., 31 BRBS 75 (CRT) (5th Cir. 1997). Once an employer establishes suitable alternative employment by providing light duty work which a claimant successfully performs but is subsequently discharged for breaching company rules and not for reasons related to his disability, the employer does not bear any new burden of providing other suitable alternative employment. Brooks v. Director, OWCP, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993); see also Harrod v. Newport News Shipbldg. & Dry Dock Co., 12 BRBS 10, 14-16 (1980) (employer met burden by showing alternative job, even though the claimant was later fired for bringing a gun to work). Once a claimant is terminated for reasons unrelated to the work related disability, the employer no longer has a duty to show suitable alternative employment and has no duty to pay further compensation benefits. Darby v. Ingalls Shipbldg., Inc., 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996).

In this case, the Parties have stipulated that Claimant reached MMI on April 27, 2001. The main issue to be decided is whether Claimant has been permanently totally disabled

since pulling his back at work in March 2001 or whether he has been capable of returning to light duty employment in Employer's facility since July 31, 2001, his last day of work.

Claimant testified that he could probably have returned to his tool repair job within a day or two after this incident. In addition, Claimant stated that he has never said that he is unable to do the tool repair job. Instead, Claimant never returned to work because Dr. Semon, his treating orthopedist, told him that he should not return to work in a shipyard and should medically retire. Not only did Claimant agree that he could do the tool repair job, but Employer also offered Claimant the opportunity to return to work as a security guard, which had even lighter physical requirements than the tool repair job.

Although he initially told Claimant not to return to work in a shipyard, Dr. Semon testified by deposition that the job requirements of the tool repair job did fit within Claimant's restrictions, so long as Claimant did not have to lift more than three to five pounds on a regular basis. According to Claimant's testimony, the tool repair job did not require him to lift more than three to five pounds on a regular basis. Dr. Semon agreed that he would have approved Claimant for the light duty tool repair job if Claimant only had occasional aches and pains at work. From Claimant's testimony, it is clear that the pulled back incident was one such instance of a brief flare-up of back pain which subsided within a day or two of the event. In addition, Drs. Revels and Crotwell, as well as Ms. Dorsey, all determined that Claimant was physically capable of doing the tool repair job.

Since Claimant's initial workplace accident in 1998, Employer has always had suitable alternative employment available for Claimant in its facility. The only reason Claimant never returned to work after July 2001 was because he was acting under Dr. Semon's orders. Dr. Semon admittedly misunderstood the requirements of the tool repair job when he told Claimant not to return to work. Claimant himself testified that he is capable of doing the tool repair job. Accordingly, I find that Employer has established suitable alternative employment by providing Claimant with light duty work in the tool room and/or in his previous security position. Both of these positions are within Claimant's restrictions and Claimant was physically capable of performing these duties. Consequently, Employer owes no compensation benefits to Claimant beyond those amounts which have already been paid.

## **Conclusion**

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

## **ORDER**

**It is hereby ORDERED, JUDGED AND DECREED that:**

Claimant's request for compensation after July 31, 2001, is hereby **DENIED**.

**ORDERED** this 3<sup>rd</sup> day of July, 2003, at Metairie, Louisiana.

**A**

**LARRY W. PRICE**  
**Administrative Law Judge**

**LWP:bab**